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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-283

WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN AND MRS. EDITH GILL,
Plaintiffs-Appellants-Applicants,

v.

AMERICAN MOTORISTS INSURANCE COMPANY, HON. JOHN J. McKEITHEN, HON. JACK P. F. GREMILLION, HON. JOHN B. FOURNET, HON. E. HOWARD McCALEB, JR., HON. WALTER B. HAMLIN, HON. JOE B. HAMITER, HON. MACK E. BARHAM, HON. JOE W. SANDERS AND HON. FRANK W. SUMMERS,
Defendants and Appellees.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals, rendered April 8, 1971, is reprinted as

Appendix C herein. The denial of the petition for rehearing, rendered May 27, 1971, is reprinted as Appendix F herein. The order of the United States District Court, Eastern District of Louisiana, Baton Rouge Division, granting defendants'-appellees' motion to dismiss on February 6, 1970, is reprinted as Appendix G herein.

The order of the Supreme Court of Louisiana, refusing on November 12, 1969, to issue a writ of certiorari or a writ of review, is reported at 227 So. 2d 596, and appears as Appendix H. The opinion of the Louisiana First Circuit Court of Appeal rendered July 2, 1969, is reported at 225 So. 2d 627 and appears herein as Appendix I. The oral and unreported decision (but reduced to writing) of the state trial court, 19th Judicial District Court holding in and for the Parish of East Baton Rouge, State of Louisiana, was rendered November 26, 1968, and appears as Appendix J herein. The trial court judgment appears as Appendix K.

JURISDICTION

The opinion and judgment of the United States Fifth Circuit Court of Appeals for which this writ of certiorari is sought were rendered on April 8, 1971.

The order denying a rehearing by that court was rendered May 27, 1971. The motion of petitioners-appellants-applicants seeking to stay the mandate and obtain an extension of time within which to petition this court for certiorari was granted on June 10, 1971, and the mandate was stayed until July 10, 1971. A further stay was granted until August 25, 1971.

The jurisdiction of this court over this petition for certiorari is conferred by 28 U.S.C. 1254(1), which permits review by the United States Supreme Court to any party by writ of certiorari.

QUESTIONS PRESENTED

1. Isn't Louisiana's system of reviewing and refinding facts at the appellate level in direct contravention to the Seventh Amendment to the United States Constitution?

2. In an overall system of justice, where the federal courts, the other forty-nine states and the United States Constitution prohibit appellate fact review, isn't it a denial of the equal protection of the law to Louisiana citizens whose litigation is subject to such appellate fact review?

3. Isn't the prohibition against appellate fact redetermination within an "ordered scheme of liberty" and of such a nature as to be "fundamental and essential"?

CONSTITUTIONAL PROVISIONS INVOLVED

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined by any Court of the United States, than according to the rules of common law." United States Constitution, Amendment VII.

"* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding. * * *" United States Constitution, Article VI.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV, Section 1.

"The Supreme Court has control of, and general supervisory jurisdiction over all inferior courts. * * * In civil cases, its appellate jurisdiction extends to both the law and the facts. * * *" Louisiana Constitution of 1921, Article 7, Section 10, as amended by Act 561 of 1958.

"* * * All appeals of which the courts of appeal have appellate jurisdiction as provided in this Section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution. * * *" Louisiana Constitution of 1921, Article 7, Section 29, as amended by Act 561 of 1958.

STATEMENT OF THE CASE

This litigation was, at its inception, a suit against American Motorists Insurance Company seeking to recover under the provisions of a fidelity bond (or insurance policy) issued by American Motorists in favor of Delta National Mutual Insurance Company and others. That suit was instituted in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana. Defendant American Motorists filed a peremptory exception of prescription, but Trial Judge C. A. Barnett overruled the exception. At trial on the merits, the jury having been waived, Trial Judge Coleman Lindsey rendered judgment in favor of plaintiffs in the amount of $14,500 plus 12% statutory penalties and $5,000 statutory penalty attorney's fees.

American Motorists appealed to the Louisiana First Circuit Court of Appeal. That intermediate state appellate

court reversed the trial court upon the single disputed question of fact whether the claim had prescribed in accordance with a two year contractual bar contained in the bond on policy. Plaintiffs then sought to invoke the supervisory jurisdiction of the Louisiana Supreme Court. However, their application for writs was denied. The court stated that, *based on the Court of Appeal's finding of facts,* there was no error of law.

Having fully exhausted all possible state remedies, plaintiffs brought suit in the United States District Court, Eastern District of Louisiana, Baton Rouge Division, as conferred by 29 USCA 1343 (3) and 1331, by 42 USCA 1983 and by 28 USCA 2284.

Plaintiffs asked for a decision by a three-judge panel, joined the enumerated state officials and Justices of the Supreme Court of Louisiana and sought to have state appellate review of facts permanently enjoined.

Honorable E. Gordon West, District Judge, on December 10, 1969, stayed all proceedings pending the outcome of *Jesse Melancon v. Hon. John J. McKeithen, etc., et al,* Civil Action 3390, and other cases consolidated therewith. But on February 6, 1970, the district court recalled the stay order and granted American Motorists' motion to dismiss.

That judgment of dismissal was appealed to the United States Fifth Circuit Court of Appeals. Holding that while the question of the constitutionality of Louisiana's system of appellate review in civil cases is an interesting one, three judges of the Fifth Circuit Court of Appeals held that the question did not have to be decided in the instant case since those three judges concluded that Louisiana's First Circuit Court of Appeal indulged in reconstruction of the indemnity policy not in reinterpretation of same (Appendix C).

In a rather exhaustive petition for rehearing the petitioners showed that, on the basis of the Fifth Circuit's own cited authorities, that court had erred and that the Louisiana intermediate appellate court had indeed reinterpreted the facts of the case (Appendix E).

From this adverse judgment and subsequent denial of rehearing petitioners seek this writ of certiorari.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

In essence petitioners ask to have this court determine whether or not the provisions of the United States Constitution apply to and protect them, or whether they by the innocent fact of being citizens of Louisiana are to be denied the protections of the Constitution afforded to all other citizens of these United States.

The United States Fifth Circuit Court of Appeals in affirming the dismissal of the case by the United States District Court has in essence determined that there is no cause of action for Louisiana plaintiffs who ask that the Seventh Amendment be applied to and its protection afforded them. It becomes readily apparent that such a decision should be reviewed on a writ of certiorari for the following reasons as set forth in Revised Rule 19(b) of the Rules of the Supreme Court of the United States.

I. A COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH ANOTHER COURT OF APPEALS ON THE SAME MATTER.

Not only have three judges of the Fifth Circuit Court of Appeals herein rendered a decision in conflict with other courts of appeals, but they have also rendered a decision in conflict with their own decisions on cases from states other

than Louisiana that are within their jurisdiction. As briefed at pages 13-18 of appellants' brief before the Fifth Circuit (Appendix A), all other states prohibit review at the appellate level of trial-found facts, whether by a judge or a jury. An extract of the numerous cited authorities for that contention of appellants shows that all other ten circuit courts of appeals and even the Fifth Circuit in a Texas case have applied the Seventh Amendment prohibition of appellate fact review to a judge as well as to a jury's findings of facts.

District of Columbia Circuit–*Shelly v. Wescott,* 23 App. D.C. 135, App. D.C. 1904.

First Circuit–*Hathaway v. First National Bank,* 10 S.Ct. 608, 134 U.S. 494, 33 L.Ed 1004.

Second Circuit–*First National Bank v. Anglo-South American Bank,* 230 F. 817, 145 C.C.A. 127; *First National Bank v. Pipe & Contractors Supply Co.,* 273 F.105, C.C.A. Conn. 1921.

Third Circuit–*Board of Education v. Maryland Cas. Co.,* 27 F.2d 20, C.C.A. N.J. 1928.

Fourth Circuit–*City of Richmond v. Smith,* 82 U.S. 429, 21 L.Ed. 200; *National Bank of S.C. v. American Surety Co.,* 67 F.2d 131, C.C.A. S.C. 1933; *U.S. to use of Statlings v. Starr,* 20 F.2d 803, C.C.A. N.C. 1927.

Fifth Circuit–*White v. Thacher,* 78 F. 862, 24 C.C.A. 374.

Sixth Circuit–*Bassett v. U.S.,* 76 U.S. 38, 19 L.Ed. 548; *Covey v. Atlas Coal & Coke,* 277 F.138, C.C.A. Mich. 1932.

Seventh Circuit–*Dooley v. Pease,* 21 S.Ct. 329, 45 L.Ed. 457, 180 U.S. 126.

Eighth Circuit–*Blair v. U.S.*, 47 F. 2d 109, C.C.A. Ark. 1931; *First National Bank v. Anderson*, 57 F.2d 270, C.C.A. Minn. 1935; *Federal Life Ins. Co. v. Bailey*, 13 F.2d 113, C.C.A. Mo. 1926; *Bayless v. Eagen*, 69 F.2d 269, C.C.A. Neb. 1934; *Bunday v. Huntington*, 224 F. 847, C.C.A. S.D. 1915.

Ninth Circuit–*Wolff v. Wells Fargo & Co.*, 115 F. 32, C.C.A. 626; *Sierra Land & Livestock Co. v. Desert Power & Mill Co.*, 229 F. 982, C.C.A. Nev. 1916; *Blanchard v. Comm. Bank*, 75 F. 249, 21 C.C.A. 319; *Hardman v. Montana Union Ry. Co.*, 83 F. 88, 27 C.C.A. 407.

Tenth Circuit–*Burden v. Burnham*, 59 F. 752, 8 C.C.A. 248; *Grayson v. Lynch*, 16 S.Ct. 1064, 163 U.S. 486, 41 L.Ed. 230; *Henry H. Cross Co. v. Texohoma Oil & Refining Co.*, 32 F.2d 442, C.C.A. Okla. 1929; *Kentz v. Mosher*, 62 F.2d 827, C.C.A. Syo. 1933.

It is evident that all other states, all other U.S. Courts of Appeals and even the Fifth Circuit for cases from states other than Louisiana have decided that there should be no appellate review of facts found by a judge or a jury. In deciding otherwise in the instant case the three judges of the Fifth Circuit Court of Appeals have committed error. Such error should be reviewed as an aspect of the sound judicial discretion of this Court.

II. THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Fifth Circuit Court of Appeals has decided or rather refused to decide an important federal question. To say that a federal question hinged directly on the Bill of Rights is an "important federal question" is the epitome of understatement.

When one of the twin basic issues of this case is the right to trial by jury in the Anglo-American tradition, that vestige of democracy that sets our system apart from less democratic systems, it is axiomatic that this is one of, if not the most important, questions of federal law.

When the trier of fact loses its decision-making authority and becomes a glorified evidence-taker for a shielded appellate fact-finder, as is Louisiana's trial judge and Louisiana's civil jury, burdening litigants with costly, time-consuming stand-offs at the "trial" level and with real decisions made in the "appellate" system, can there be any doubt that a federal question is posed for consideration?

Seventh Amendment rights belong to Louisiana citizens too.

III. A COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Again, as exhaustively briefed at pages 7-13 of appellants' original brief before the Court of Appeals (Appendix A), this court has applied seven of the first eight amendments to the several states according to the specific decisions cited therein.

This court held in *Gideon v. Wainwright*, 83 S.Ct. 792, 372 U.S. 335, that the fundamental safeguards of the Bill of Rights are protected against state invasion by the due process clause of the Fourteenth Amendment (appellants' brief at Appendix A).

Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, was even more specific in expressly stating that these "fundamental rights" include the first eight amendments.

This court in properly applying the precepts of the Constitution has repeatedly applied the principles of the Bill of Rights to the several states via the due process, equal protection or the supremacy clauses of the Constitution. The decision of the Fifth Circuit Court of Appeals is in diametric opposition to the applicable decisions of this Honorable Court in addition to being repugnant to the principles of the Constitution.

IV. THE FIFTH CIRCUIT COURT OF APPEALS HAS NOW FAR DEPARTED FROM THE STANDARDS OF JUDICIAL PROCEEDINGS AND HAS NOW SANCTIONED SUCH DEPARTURE BY LOWER COURTS UNDER ITS JURISDICTION, BOTH FEDERAL AND STATE.

When the established purpose of the courts is to uphold the Constitution, what could be more of a departure from the usual course of the process of justice than to decline to apply such more basic principles of the Constitution? This is no isolated departure. In not seeing that the courts under its directory or supervisory jurisdiction apply Constitutional precepts, the Fifth Circuit Court of Appeals is every day acquiescing in, indeed, sanctioning violations of fundamental rights inherently belonging to Louisiana citizens.

CONCLUSION

Quite possibly in an overzealous effort to conform with the rules of the court in requiring accurate, brief and clear understanding of the points of consideration, petitioners may have slighted the most important fact of this whole petition. That fact is simply this—petitioners have sought through long and costly processes at all state and federal court stages (six courts in number) to have the Seventh Amendment applied, at first inferentially, then

blatantly. Whatever the reason, improper assumption of the decision making power, a decision in conflict with applicable decisions, a conflict among lower courts, or a departure from usual proceedings, one thing rings unequivocally clear—that this case presents a real and pressing question of Constitutionality that is long overripe for decision and can only be decided by the Supreme Court of these United States.

The issues have been briefed below and are before this court. The Seventh Amendment is unequivocal in its dictate—no appellate review of facts. Until this constitutional principle is applied to citizens of Louisiana as it is applied to the citizens of every other state, this case and every case before Louisiana's courts is likely to be tried twice—once before the so-called trial court and a second conclusive time ("second bite at the apple") by a relatively faceless appellate judiciary that has neither seen, heard, smelled or formed intuitive or rational responses or reactions to either litigant or witness.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NUMBER 29604

WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN AND MRS. EDITH GILL, PLAINTIFFS AND APPELLANTS

VERSUS

AMERICAN MOTORISTS INSURANCE COMPANY, HON. JOHN J. McKEITHEN, HON. JACK P. F. GREMILLION, HON. JOHN B. FOURNET, HON. E. HOWARD McCALEB, JR., HON. WALTER B. HAMLIN, HON. JOE B. HAMITER, HON. MACK E. BARHAM, HON. JOE W. SANDERS AND HON. FRANK W. SUMMERS, DEFENDANTS AND APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION.

ORIGINAL BRIEF ON BEHALF OF WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN AND MRS. EDITH GILL, PLAINTIFFS AND APPELLANTS.

MAY IT PLEASE THIS HONORABLE COURT:

STATEMENT OF THE ISSUE

Is appellate review of facts inherently unconstitutional?

STATEMENT OF THE CASE

This litigation was, at its inception, a suit

against defendant American Motorists Insurance Company seeking to recover under the provisions of a fidelity bond (or insurance policy) issued by American Motorists in favor of Delta National Mutual Insurance Company and others. Appendix, pages 20-21. That suit was instituted in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana. App. p. 10. Defendant American Motorists filed a peremptory exception of prescription, but Trial Judge C.A. Barnett overruled the exception. App. p. 25. At trial on the merits, the jury having been waived, Trial Judge Coleman Lindsey rendered judgment in favor of plaintiffs in the amount of $14,500 plus 12% statutory penalties and $5,000 statutory penalty, attorney's fees. App. pp. 15, 30.

American Motorists appealed to the Louisiana First Circuit Court of Appeal. App. 21. That intermediate state appellate court reversed the trial court upon the single disputed question of fact whether the claim had prescribed in accordance with a two year contractual bar contained in the bond or policy. App. pp. 23, 26-27. Plaintiffs then sought to invoke the supervisory jurisdiction of the Louisiana Supreme Court. App. pp. 28-44. However, their application for writs was denied. App. pp. 44-45. The court stated that,

based on the Court of Appeal's finding of facts, there was no error of law. App. p. 45.

Having fully exhausted all possible state remedies, plaintiffs brought suit in the United States District Court, Eastern District of Louisiana, Baton Rouge Division, as conferred by 29 USCA 1343 (3) and 1331, by 42 USCA 1983 and by 28 USCA 2284. App. pp. 1-6.

Plaintiffs asked for a decision by a three-judge panel, joined the enumerated state officials and Justices of the Supreme Court of Louisiana and sought to have state appellate review of facts permanently enjoined. App. pp. 1-6.

Honorable E. Gordon West, District Judge, on December 10, 1969 stayed all proceedings pending the outcome of Jesse Melancon v. Hon. John J. McKeithen, etc., et al, Civil Action 3390, and other cases consolidated therewith. App. p. 6. But on February 6, 1970 the district court recalled the stay order and granted American Motorists' motion to dismiss. App. pp. 45-46.

ARGUMENT

APPELLATE REVIEW OF TRIAL COURT FINDINGS OF FACT IS EXPRESSLY PROHIBITED BY THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

No constitution including our own is altogether written or unwritten. The most distinctive feature of our Constitution, however, is that it is law, paramount, supreme, overriding law. In ways both obvious and subtle our Constitution is an instrument of rights, of limitations; of individual rights, of governmental limitations. One of these rights, also setting forth limitations on government, deemed so sacred to freedom and a system of justice, is the Seventh Amendment to the Constitution:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined by any Court of the United States, than according to the rules of common law."

It has long been recognized that the Seventh Amendment has two separate and distinct clauses. Mr. Justice Story, speaking of the two distinct clauses of the Seventh Amendment, said in Parson v. Bedford, 28 U.S. 433, 3 Pet. 433, 7 L.Ed. 732:

"But the other clause of the Amendment

> is still more important, and we read it as a substantial and independent clause... This is the prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner (than the) modes known to common law."

Our law of 1789 was merely the trunk of our system of government. The branches and refinements of this system were and are being constantly added to this foundation. Out of this evolutionary process we now have two separate and distinct rights or limitations delineated in the Seventh Amendment. First, we have the right to trial by jury in civil cases. Secondly, and of equal importance, we have the limitation upon the practice of appellate review of trial court findings of fact.

The inherent nature of the limitation upon reviewing the fact-trier's findings is recognized in the federal courts, even those sitting in the confines of Louisiana. No reviewing federal court may substitute its judgment for that of the original fact-trier. Even for a federal trial judge to set aside a verdict or render decision where the jury has not been waived, he must do that either by summary judgment, directed verdict, or motion N.O.V. (notwithstanding the verdict), all predicated on the premise that no material facts

are in dispute and the case is not jury material. Rules 50, 56, Federal Rules of Civil Procedure.

Under the guidelines set forth in Erie v. Tompkins, 58 S.Ct. 433, 302 U.S. 671, 82 L.Ed. 518, the question of appellate review of facts would have been substantive law and the federal courts would have been bound to apply state law on the subject. The rule handed down in Erie was of course that the substantive law of the several states, both statutory and decisional, shall be regarded as rules of decision in civil actions in the courts of the United States. With the evident shortcomings and inherent violations of constitutionally vested rights, the Supreme Court began to correct these errors. First, they promulgated the Federal Rules of Civil Procedure in 1938. Second, they made ramifications in the Erie doctrine. It was held that, where the mode or modality of trial is affected, federal policy must prevail over state policy. Byrd v. Blue Ridge Electric Co-Operative Inc., 78 S.Ct. 893, 356 U.S. 525, 82 L.Ed. 518, dealing with right to trial by jury, said that there are "areas" where Erie does not apply. Federal policy must prevail in these areas in order to assure protection of the Constitution.

So redetermination of trial court fact finding

is foreign to American courts. Our federal system recognizes two distinct clauses and two distinct rights or limitations in the Seventh Amendment. Our system of justice, as envisioned in the Constitution and as interpreted in our courts, guarantees and safeguards the right of every citizen of the United States of America to both a civil jury trial and no appellate review of facts as found in trial court.

THE EXPRESS PROHIBITION AGAINST APPELLATE REVIEW OF FACTS, AS DELINEATED BY THE SEVENTH AMENDMENT, IS BINDING UPON THE SEVERAL STATES BY VIRTUE OF BOTH THE "SUPREMACY CLAUSE" OF ARTICLE SIX AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

The United States Supreme Court held in Gideon v. Wainwright, 83 S.Ct. 792, 372 U.S. 335:

> "Those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement are equally protected against state invasion by the due process clause of the Fourteenth Amendment."

The court further stated that any provision of the Bill of Rights which is "fundamental and essential" to a fair trial is made obligatory upon the states by the Fourteenth Amendment.

What are these "fundamental safeguards" against federal action that are now applicable to the states via the Fourteenth Amendment? The Supreme Court stated in Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444:

> "We conclude that certain fundamental rights, safeguarded by the first eight amendments against federal action, are also safeguarded against state action by the due process clause of the Fourteenth Amendment." (Emphasis added).

Grosjean and Gideon were no sudden revelations but were among the case-by-case process through which the Supreme Court sought to declare full protection to every citizen of the Union. Some background cases through which Grosjean, Gideon and similar rights cases evolved are Twinging v. State of New Jersey, 29 S. Ct. 14, 21 U.S. 78; Mooney v. Holohan, 55 S.Ct. 340, 294 U.S. 103; Smith v. O'Grady, 61 S.Ct. 572, 312 U.S. 329; Testa v. Katt, 67 S.Ct. 810, 330 U.S. 386.

In Twining the Supreme Court in 1908 stated that it is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action because a denial of them would be a denial of due process.

In Mooney v. Holohan the court in 1935 stated that the obligation to guard and enforce every right secured by the federal Constitution rests on state courts equally with federal courts.

In 1941 Smith noted that the Constitution is the "supreme law of the land" through the supremacy clause of Article Six and the obligation to enforce same vests on state courts equally with federal courts.

Testa v. Katt in 1947 held that the Constitution is the "supreme law of the land" binding alike upon states, courts and people, anything in the constitution or laws of any state to the contrary notwithstanding.

States are bound to observe at least seven out of eight first amendment rights, according to specific decisions.

In 1967 the Supreme Court decided the Obscenity Case. Redrup v. New York, Austin v. Kentucky, Gent v. Arkansas, 386 U.S. 767, S.Ct. The court said that prohibitions against government intrusion into areas of free speech applied to the states. Those cases reinforced a long line of older free speech decisions that had found the First Amendment applies to every state.

U.S. v. Hall, 26 Fed. Cas. No. 15,282 held the Second Amendment dealing with the right of the people to keep and bear arms applies to every state.

Burton v. Sills, 248 A. 2d 462, held the Third Amendment prohibiting soldiers from being quartered in the owner's home without the owner's consent is binding upon the several states.

Katz v. U.S., 389 U.S. 347, S. Ct., held that the Fourth Amendment prohibiting unreasonable search and seizure is obligatory upon the states.

In the famous self incrimination decision, Miranda v. Arizona, 86 S.Ct. 1602, 384 U.S. 436, the Fifth Amendment was again applied to the states.

In Duncan v. Louisiana, 391 U.S. 745, S.Ct., Sixth Amendment safeguards in criminal jury trials apply to the states.

In Robinson v. State of California, 82 S.Ct. 1417, 370 U.S. 660, the Eighth Amendment prohibition against cruel and unusual punishment is binding upon the states.

Over a period of time the Court has found each of the first eight amendments, with the singular exception of the Seventh, to be applicable to the states by incorporation through the due process clause of the

Fourteenth Amendment. In Gideon v. Wainwright, id, and in Pointer v. Texas, 85 S.Ct. 1065, 380 U.S. 400, 13 L.Ed. 923, incorporation was designated by Justice Black as those rights that are "within an ordered scheme of liberty," fundamental and essential and, therefore, applicable to the states.

How, then, can there be any question of the applicability of the Seventh Amendment to the states? Obviously the Seventh Amendment was and is "fundamental and essential."

Since the state of Louisiana allows trial by jury, that state must allow a real trial by jury in accordance with the Seventh Amendment to the U.S. Constitution. Louisiana's Constitution provision allowing trial by jury in both civil and criminal cases, assuming that the state can allow that which is a vested federal constitutional right, is Article VII, Section 41. There can only be trial by jury in Louisiana in the common law tradition. Whatever jury system prevails here came not from civil law heritage. Trial by jury (as enacted, Louisiana Code of Civil Procedure, Articles 1731-1814) carries with it, therefore, certain positive historical attributes of Anglo-American trial by jury. Necessarily implicit among these attributes

is the Seventh Amendment prohibition against re-examination by appellate tribunals of trial court fact determinations.

The State of Louisiana, in recognizing the right of trial by jury, incurs the responsibility to prevent appellate review of facts despite provisions in the Louisiana Constitution, Article VII, Sections 10 (6) and 29, permitting same. To allow appellate fact review effectively destroys jury trial rights. There would and does exist in Louisiana the form but not the substance of a real jury decision. This is especially true in light of such statements as: "A denial of any one of the essential elements or incidents of a jury trial is a denial of that mode of trial." Patton v. U.S., 50 S.Ct. 253, 281 U.S. 276.

This very prohibition against state appellate review of jury-found facts is the subject of a series of cases also instituted in the U.S. District Court, Eastern District of Louisiana, all pending before a three-judge panel at the time this brief was written, and with which this case was and is sought to be consolidated: Jessie Melancon v. Hon J.J. McKeithen, etc., et al, Civil Action 3390; Mrs. Edith Hill v. Hon. J.J. McKeithen, et al, Civil Action 67-20; Derle Long v.

Hon. J.J. McKeithen et al, Civil Action 68-28; Fleta A. Jones v. Aetna Casualty & Surety Co. et al, Civil Action 68-2; Joseph A. Motichek v. Hon. J.J. McKeithen et al, Civil Action 68-225; Gurthie A. Mays et al v. Frederick S. Ellis et al, Civil Action 68-110; Mrs. Violet Rose Foy v. Hon J.J. McKeithen et al, Civil Action 69-51; Samuel G. Henson v. Gurtler, Hebert & Co. Inc., Civil Action 69-247.

THE FINDINGS OF FACT BY A TRIAL JUDGE HAVE THE FORCE AND EFFECT OF A JURY VERDICT WHEN THE LITIGANTS HAVE WAIVED A JURY.

Louisiana is the only state in the Union that still permits any of its appellate courts to review or redetermine trial court facts.

The practice of appellate fact review was permitted in several New England states prior to the Constitution. Even those states stopped the practice long before passage of the Bill of Rights. At the time the Constitution was drafted, every state had abolished appellate review of facts. The Seventh Amendment prohibition against appellate review of facts was more perfectly aligned with theory that disputes should be decided by one's peers. America's jury system was brought from England. A representative group of citizens from every walk of community life, perhaps twelve

in number, was and is better qualified to judge the facts of a particular case than was and is a reviewing law court which neither see, hear nor smell the parties or their witnesses. Jury trials antedated the Magna Carta and other vestiges of freedom.

In accordance with the prevailing prohibition against appellate review of facts, Louisiana historically was felt to have complied with the U.S. Constitution and its first ten amendments. Even the most cursory examination of Louisiana's documentary history prior to statehood, however, shows that Louisiana citizens were never meant to be denied any rights or privileges afforded other citizens. The Treaty of Paris of April 30, 1803 stated that inhabitants of the Louisiana territory would be citizens of the United States "according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States." The Act of Congress of March 26, 1804 provided for a legislature for the territory of Louisiana and included the prohibition against passage of any law inconsistent with the Constitution and laws of the U.S.

Louisiana is the <u>only</u> jurisdiction within the U.S. that allows this deprivation of constitutionally vested rights. Where the jury is waived and the case is

tried to the trial judge, the findings of the trial judge have the force and effect of a jury verdict. The trial judge's findings of fact are not reviewable by courts of appellate jurisdiction.

Alabama	Benton Mercantile v. Owensboro Wagon Co., 91 So. 784, 207 Ala. 49.
Alaska	Fairbanks v. Barrack, 282 F. 417 (providing for de novo trial at appellate level).
Arizona	Wright v. Young, 176 P. 583, 20 Ariz. 46.
Arkansas	Blair v. U.S., 47 F. 2d 109, CCA Ark 1931; Occidental Life Ins. Co. v. Simmons, 224 Ark. 31, 271 S.W. 2d 922.
California	Wolff v. Wells Fargo & Co., 115 F. 32, 52 C.C.A. 626.
Colorado	Stull v. People, 140 Colo. 278 (providing for de novo trial at appellate level).
Connecticut	First National Bank v. Pipe & Contractors Supply Co., 273 F. 105, CCA Conn. 1921.
Delaware	State v. Harris, 75 A. 2d 214 (providing for de novo trial at appellate level).
District of Columbia	Shelly v. Wescott, 23 App. D.C. 135, App. D.C. 1904.
Florida	Kline v. Blackwell, 63 F. 2d 897, CCA Fla. 1933; Chakford v. Strum, 87 So. 2d 419.
Georgia	U.S. v. Kelly, 68 F. 2d 312, CCA Ga. 1934; Engram v. Faircloth, 54 S.E. 2d 598, 205 Ga. 577.
Hawaii	Paki v. Saffery, 29 Hawaii 250.
Idaho	Pairley v. Harris, 292 P. 2d 765, 77 Idaho 336.

Illinois	Dooley v. Pease, 21 S.Ct. 329, 45 L. Ed. 457; 180 U.S. 126; Andrews v. Matthewson, 75 N.E. 2d 123, 332 Ill. App. 325.
Indiana	Miller v. Ortmann, 136 N.E. 2d 17, 235 Ind. 641.
Iowa	Cleary v. Wolin, 58 N.W. 2d 83, 244 Iowa 956.
Kansas	Bruden v. Burnham, 59 F. 752, 8 C.C.C.A. 248; Scrivner v. Tucker, 201 P. 2d 632, 166 Kan. 295.
Kentucky	Bristow v. Taul, 219 S.W. 2d 641, 310 Ky. 82.
Maine	Consumer Fuel Co. v. Parmenter, 116 A. 2d 138; 151 Me. 83.
Maryland	Board of County Commissioners v. Jay, 89 A. 715 (providing for de novo trial at apellate level).
Massachusetts	Hathaway v. First National Bank, 10 S. Ct. 608, 134 U.S. 494, 33 L. Ed. 1004.
Michigan	Corey v. Atlas Coal & Coke, 277 F. 138, CCA Mich. 1932; Watrous v. Conor, 254 N.W. 143, 266 Mich. 397.
Minnesota	First National Bank v. Anderson, 57 F. 2d 270, CCA Minn. 1935.
Mississippi	U.S. Fidelity & Guaranty Co. v. State, 53 So. 2d 11, 211 Miss. 864.
Missouri	Federal Life Ins. Co. v. Bailey, 13 F. 2d 113, CCA Mo. 1926; State ex rel S.S. Com. v. Butler's Estate, 181 S.W. 2d 268, 353 Mo. 14.
Montana	Hardman v. Montana Union Ry. Co., 83 F. 88, 27 CCA 407; Ely v. Mont. State Fed of Labor, 160 P. 2d 752, 117 Mont. 609.

Nebraska	Bayless v. Eagen, 69 F. 2d 269, CCA Neb. 1934; Scottsbluff Nat. Bank v. First State Bank, 76 N.W. 2d 445, 162 Neb. 475.
Nevada	Sierra Land & Live Stock Co. v. Desert Power & Mill Co., 229 F. 982, CCA Nev. 1916.
New Hampshire	Grafton County Electric & Power Co. v. State, 93 A. 1028, (providing for de novo trial at appellate level).
New Jersey	Board of Education v. Maryland Cas. Co., 27 F. 2d 20, CCA N.J. 1928.
New Mexico	Grayson v. Lynch, 16 S. Ct. 1064, 163 U.S. 486, 41 L.Ed. 230.
New York	First National Bank v. Anglo-South American Bank, 230 F. 817, 145 C.C.A. 127; Karameros v. Luther, 2 N.Y.S. 2d 508, 166 Misc. 376.
North Carolina	U.S. to Use of Stallings v. Starr, 20 F. 2d 803, CCA N.C. 1927; Wachovia Bank v. Miller, 89 S.E. 2d 765, 243 N.C. 1.
North Dakota	Schulenberg v. Long, 221 N.W. 69 (providing for de novo trial at appellate level).
Ohio	Bassett v. U.S., 76 U.S. 38, 19 L. Ed 548; In re Lowry's Estate, 42 N.E. 2d 987, 140 Ohio St. 223.
Oklahoma	Henry H. Cross Co. v. Texohoma Oil & Refining Co., 32 F. 2d 442, CCA Okla. 1929; Rain v. Ralph, 293 P. 2d 359.
Oregon	McMillian v. Kik, 181 P. 2d 128, 181 Or. 270.
Pennsylvania	Western Assurance Co. v. Weiner, 38 F. 2d 229, CCA Pa. 1930; Perkins v. Halpren, 101 A. 741, 257 Pa. 402.
Rhode Island	Lundell v. Lamoniello, 67 A. 2d 401, 75 R.I. 113.

South Carolina	National Bank of S.C. v. American Surety Co., 67 F. 2d 131, CCA S.C. 1933; Weston v. Metro. Life Ins. Co., 33 S.E. 2d 386, 206 S.C. 128.
South Dakota	Bunday v. Huntington, 224 F. 847, CCA S.D. 1915.
Tennessee	Moore v. Chase, 156 S.W. 2d 84, 25 Tenn. App. 239.
Texas	White v. Thacket, 78 F. 862, 24 C.C.A. 374; Rurm v. Holstrom, 243 S.W. 2d 862.
Utah	Price v. Price, 289 P. 2d 1044, 4 Utah 2d 153.
Vermont	Platt v. Shields, 119 A. 520, 96 Vt. 257.
Virginia	City of Richmond v. Smith, 82 U.S. 429, 21 L. Ed. 200; Duncan v. Barbour, 49 S.E. 2d 260, 188 Va. 53.
Washington	Blanchard v. Comm. Bank, 75 F. 249, 21 C.C.A. 319; Kennedy v. Meilicke Calculator Co., 155 P. 1043, 90 Wash. 238.
West Virginia	DesStubner v. United Carbon Co., 28 S.E. 2d 593, 126 W. Va. 363.
Wisconsin	Buttreck v. Roy, 39 N.W. 345 (providing for de novo trial at appellate level).
Wyoming	Kentz v. Mosher, 62 F. 2d 827, CCA Wyo. 1933.

Sarpy, "Civil Juries, Their Decline and Eventual Fall," 11 Loyola Law Review 243 (1962), with which plaintiffs cannot fully agree, says that statistics show that civil juries are used sparingly in state court jury trials outside Louisiana. Juries are frequently waived.

The U.S. Supreme Court held in Mercer v. Theriot, 84 S.Ct. 1157, 377 U.S. 152, and in Basham v. Penn, 83 S. Ct. 965, 372 U.S. 699, that what the jury decides shall not be changed so long as the trial is fair. When a judge, learned in the law, is the fact-trier, his fact determinations should likewise be final. He alone should determine demeanor. He alone should determine credibility, credence, the weight of the testimony. He alone sees, hears and smells those who testify.

Moreover, the antiquated Louisiana practice of permitting faceless, tasteless, deaf fact review, under color of law, is so foreign to our concept of justice as to be outside the requisite "ordered scheme of liberty."

Appellate review of facts, on the other hand, is prohibited in Louisiana criminal proceedings. Appeal lies only on law questions. Louisiana Constitution, Article VII, Section 10 (7).

Parties in a Louisiana civil proceedings are subjected to as many as three trials -- at the district court level, in intermediate appellate court and possibly in the state Supreme Court if writs are granted. The appellate tribunals view the ice-cold record. A premium is put on counsel's ability at appellate advocacy. Louisiana's civil litigants receive two or even three

"days in court" rather than their customary one. Why indeed Louisiana citizens bear the expense and inconvenience of trying their disputes more than once?

Plaintiffs and all other citizens of the state of Louisiana are deprived of rights, privileges and immunities safeguarded and protected by the Constitution and Bill of Rights of the United States of America.

ASIDE FROM ITS UNCONSTITUTIONALITY, FACT REVIEW BY APPELLATE COURTS HAS CERTAIN INESCAPABLE PROCEDURAL SHORTCOMINGS.

As already indicated, review of facts deprives the final fact-finder of observing the demeanor of witnesses necessary to decide credibility and weight of evidence. The right to present demeanor evidence itself is a constitutional right secured by the Fifth and Fourteenth Amendments. S. Bushsbaum & Co. v. Federal Trade Commission, 153 F. 2d 85, 66 S.Ct. 1016. How can any procedure other than complete reconstruction of the trial (an impossibility even with video television or movies) afford appellate judges the benefit of demeanor, weight of evidence and credibility that are such an integral part of fact finding? To allow otherwise encroaches upon the very essence of the right to trial by jury as encompassed in the Seventh Amendment. Even

the most illogical extrapolations will show that appellate fact review destroys the right to trial by jury. The same can be said of trial judge decisions where the jury is waived.

Indeed, the issue in the instant case is not unlike the eight cases with which this matter was and is sought to be consolidated -- cases pending before a three-judge panel in the U.S. District Court for the Eastern District of Louisiana, all eight of which have already been mentioned hereinabove. Those cases face up to the urgent question whether twelve men, good and true, shall really judge their peers in Louisiana rather than three state appellate judges sitting in effect as a jury without benefit of the senses of sight, hearing, smell or intuition. There can be little doubt that those cases do present for judgment a practice of Louisiana state courts that is blatantly unconstitutional.

Moreover, within an "ordered scheme of liberty," where all other states and federal courts prohibit review of facts, and where the jury is waived, the practice of Louisiana courts in so reviewing, changing or creating facts, under color of law, is also state action that deprives plaintiffs of the rights and liberties accorded them by the Constitution of the United States.

CONTRARY TO THE CONTENTIONS OF AMERICAN MOTORISTS AND THE HOLDING OF THE COURT BELOW, THE ACTION OR INACTION BY SEVERAL ENUMERATED DEFENDANTS, AS OFFICIALS AND JUSTICES OF THE STATE OF LOUISIANA, DOES PRESENT A FEDERAL QUESTION.

In the court below American Motorists was granted its motion to dismiss plaintiffs' suit predicated on two grounds.

First, American Motorists contended that plaintiffs by appealing to Louisiana's First Circuit Court of Appeal waived their right to oppose appellate fact review. Plaintiffs could no more waive the prohibition against appellate fact review than they could waive other vested constitutional rights en mass. Actually plaintiffs did not appeal, though by answering American Motorists' appeal their answer may have been tantamount to an appeal. Article 2133, Louisiana Code of Civil Procedure. Their answer did not of itself waive their Seventh and Fourteenth Amendment safeguards.

Appellate review of facts is by definition unconstitutional.

And by no stretch of the imagination do plaintiffs attack the right of appeal on questions of law alone.

Plaintiffs fully pursued and thoroughly exhausted

their remedies in the state court system. When plaintiffs had fully exhausted available state procedures, then and only then was a federal question raised. Louisiana's appellate fact review is repugnant to and totally inconsistent with the "ordered scheme of liberty" that founders of this nation thought so sacred.

Second, American Motorists contended that the question of prescription was one of law rather than fact.

The distinction between law and fact is given by Weiner in "The Civil Non Jury Trial and the Law-Fact Distinction," 55 Calif. Law Review 1020: "A question of identifying broadly formulated principles for judging the parties' conduct can meaningfully be defined as a question of law; a question of reconstructing acts or events which have actually taken place or conditions which have actually existed can meaningfully be defined as a question of fact."

In Louisiana the prescription by which debts are released is a peremptory and perpetrual bar to every species of action, real or personal, when the creditor has been silent for a stated period of time without urging his claim. Article 3459, Louisiana Revised Civil Code. The factual determination whether the required period of time had elapsed was decided in the

earliest stages of this litigation. The state trial court found as a fact that the prescriptive period had not run. Previous suit had been filed by the receiver of one of the assureds covered by the bond or policy inuring to the benefit of plaintiffs -- well within the two year contractual period. The creditor had not been silent.

Louisiana's First Circuit Court of Appeal however reversed the decision of the trial court. The appellate tribunal made a new factual determination that the two year prescriptive period fixed in the bond or policy had elapsed. That re-examination and re-determination clearly constituted appellate review of facts, as envisioned in the second clause of the Seventh Amendment, made obligatory upon the states by the due process clause of the Fourteenth Amendment.

The instant case presents a distinct federal question not only ripe but long overdue for adjudication.

THE EXACT SCOPE OF LOUISIANA'S APPELLATE FACT REVIEW IS INSUSCEPTIBLE OF DEFINITION, AND STATE APPELLATE COURTS HAVE CONSISTENTLY REFUSED OR HAVE BEEN UNABLE TO DEFINE THEIR OWN DUTIES CONCERNING LIMITATIONS UPON APPELLATE REVIEW OF FACTS.

Do appellate judges in Louisiana have a duty to review facts? If so, what are the nature and scope of that fact review? A 150-year divergence of opinion and the wide spectrum of results both attest to Louisiana's failure to guarantee a real trial.

Louisiana appellate decisions most often chant the manifest error refrain as the basis for re-creating or not re-creating facts. Origins of the litany are obscure. In light of state constitutional provisions permitting appellate fact review, however, the rule may once have been intended to limit or restrict the freedom to overturn trial court findings of fact. See: Robertson, "Appellate Review of Facts in Louisiana Civil Cases," 21 La. Law Review 402, esp. 404 (not cited for its author's conclusions with which plaintiffs do not agree). Attempts to define "manifest error" frequently oppose one another.

McMillan v. Louisiana Mfg. & Mercentile Co., 125 La. 854, 51 So. 1013, for example, said the trial court will be reserved whenever there is "reasonable certainty of error." On the other hand, Basile v. Taranto, 124 La. 677, 50 So. 649, said lower courts would be reversed only if there is no evidence of record which supports the findings. Both cited in 21 La. Law Review 402 at 408.

Divergence of opinion and variety of results differ among more than 1,000 "manifest error" cases listed in Louisiana Digest, Vol. 2A, Appeal & Error, ¶1008, etc. That which is clearly or manifestly erroneous has not been standardized, described or defined. The incongruity is pointed up by accident in Brown v. Louisiana Railway & Nav. Co., 147 La. 829, 86 So. 281: "It is true that we defer largely to the judgment of the jury on findings of fact in cases like these, but the (Louisiana) Constitution compels us to consider questions of fact and exercise our own judgment thereof to some extent." (Emphasis added).

Not only is divergence of views concerning the manifest error intonation found among the cases, but there are instances of discrepancy within the same case. The doctrine was cited to uphold the lower court's finding of liability but ignored to reduce quantum. Dozier v. Fire Assn. of Philadelphia, 116 So. 2d 185. Cited in 21 La. Law Review 402 at 409.

Obvious shortcomings are pointed out by Judge Albert Tate of the Louisiana Third Circuit Court of Appeal, dissenting in Kleb v. Choate, 193 So. 2d 647 -- while himself chanting the same refrain. Judge Tate said the appellate court majority "arbitrarily disturbed the discretion of the trial court without any reason supported

by the record." That disturbance, he said, stemmed from "blind appellate sympathy" that should never be substituted for manifest error.

Almost unquestionably the trial court is in a better position to decide questions of credibility. However, doubt is cast even upon that proposition. In Von Eye v. Byrnes, 124 La. 769, 50 So. 708, the Louisiana Supreme Court reversed a trial court determination of fact by stating:

> "Our appellate jurisdiction over the facts of the case compels us to reverse verdicts and judgments when they are clearly against the preponderance of the evidence. The same jurisdiction and the mandate of the Code of Practice compel us to render such judgment as should have been rendered below."

In Owens v. Felder, 35 So. 2d 671, the statement was made:

> "We are reluctant to reverse the finding of a trial court based primarily on questions of fact, but in a case such as we are presently analyzing, it is a self-evident principle that it is occasionally easier to perceive fallacies and inconsistencies in the record by a comparison of various portions than it is to accurately observe and catalogue them while listening to the oral evidence of the various witnesses who testified during the course of trial."

Both cases cited in 21 La. Law Review 402 at 411.

Why indeed have a trier of fact in Louisiana trial courts in face of such wanton "blind appellate sympathy"?

This very court in Employers Liability Assurance Corp. v. Madden, 219 F. 2d 205, recognized that Louisiana's permissive fact reviewing system makes it impossible to determine the state's substantive law concerning the sufficiency of evidence. What indeed is "more probable that not" in Louisiana state courtrooms?

THE VERY ESSENCE OF OUR FEDERAL SYSTEM AND THE CONSTITUTION IS AT ISSUE HERE.

One can hardly negate the fundamental and essential nature of the Seventh Amendment and the practice of other states and federal courts that incorporate it into "an ordered scheme of liberty." That these first eight amendment rights are made obligatory upon the states is easily aevidenced. In applying constitutional safeguards to state actions, no positive value of the practice of appellate fact review can be conjured. The practice restricts the right to a real trial, whether by jury or by waiver of jury. What Louisiana practice essentially says is that you have a right to a fair trial by jury but you are more than likely to be reversed on appeal. And you have a right to a fair trial

by judge alone, but his findings will be scrutinized and possibly re-found by three judges later on. There simply is no overriding or compelling state interest that should or would allow diminution of constitutional rights to a fair trial, whether by jury or waiver of jury.

CONCLUSION

This Court should reverse the decision of the U.S. District Court below and remand the same with directions.

Respectfully submitted

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CERTIFICATE

I hereby certify that copies of this brief have been mailed to counsel for defendants. Baton Rouge, Louisiana, this June ____, 1970.

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APPENDIX B

UNITED STATES COURT OF APPEAL

IN THE

FIFTH CIRCUIT

No. 29604

WILLIS L. GORE, etc., et al.
Plaintiffs - Appellants
vs
AMERICAN MOTORISTS INSURANCE CO., et al.
Defendants - Appellees

Appeal from the United States District Court
Eastern District of Louisiana
Baton Rouge Division

BRIEF FOR APPELLEE
AMERICAN MOTORISTS INSURANCE CO.

MAY IT PLEASE THE COURT:

STATEMENT OF THE ISSUES

Appellants claim that the issue herein is: "Is appellate review of facts inherently unconstitutional?"

Appellee suggests that this appeal is frivolous and that there patently is no issue of fact involved.

There really is no issue at all, unless appellants are taken literally, and that is to say that there can be no appellate review of any kind, as a matter of federal constitutional law.

We would suggest that a more appropriate statement of the issue might be:

> Does the Federal Constitution prohibit a Louisiana appeals court from reviewing a Louisiana trial court's judgment on the merits of a case, and ruling on the question of prescription (or statute of limitations), when the trial court overruled a motion in limine to dismiss on the basis of prescription, the defense was specifically put at issue at the trial on the merits, evidence was taken on the issue, and the trial court (a different judge) refused to rule on the defense of prescription on the merits, but said: "... the court is not going to consider any defense of prescription and the other defense allied thereto. These are matters that have been passed upon by other judges of this court, and this particular trial judge proposes to let these questions go to the appellate court on the basis of prior rulings." (App. 10-11)

Another way of saying it would be:

> In the absence of any trial court fact findings whatever relative to a defense of prescription, and in the light of the trial court's specific refusal to rule on the merits of a prescription plea, does the Federal Constitution prohibit a Louisiana appeals court from considering such defense on the basis of undisputed facts and from deciding the issue as a matter of law?

STATEMENT OF THE CASE

We contest appellant's statement that the Louisiana Court of Appeal reversed the trial court "upon

the single disputed question of fact," (Br. p.2). The ruling was solely one of law.

Otherwise, we point out that appellants sued in the shoes of Delta National Mutual, having acquired that company's rights, if any, at judicial sale on May 5, 1965 (App. p.24).

Appellants' sole standing was as the successor of Delta National. They had no independent rights. The suit was brought to enforce alleged rights of Delta National on a fidelity insurance agreement.

Appellants' brief fails to set forth the undisputed facts of this case. Utilizing appropriate district court rules appellee established the following undisputed facts (App. pp.7-9):

1. The exhibits attached to the motion to dismiss are correct copies (App. pp.9-45).

2. The insurance contract sued upon by appellants contained the following provisions as quoted by the Louisiana First Circuit Court of Appeal:

> "The insurance afforded by Insuring Agreement I shall apply only to such loss which shall be discovered prior to the expiration of two years ... from the effective date of the cancellation or termination of this policy ..." ***
>
> "*** No suit to recover on account of loss under this policy shall be brought ... unless com-

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menced within two years from the date upon which the loss was discovered by the assured."

3. Delta Fire & Casualty Company was an affiliate of Delta National and also was insured under the policy at issue (App. p.34).

4. In August 1959 discovery was made of a loss in Delta Fire & Casualty Company because of acts of Thomas (App. p.36).

5. The insurance policy was terminated as of September 16, 1959 (App. p.26).

6. On November 24, 1959, the court appointed receiver for Delta Fire filed a formal proof of loss on an alleged loss in Delta Fire. On July 1, 1960 the receiver filed suit against American Motorists on the loss. This suit was terminated by compromise, release and settlement and was dismissed in September 1964 (App. pp. 26, 36).

7. The loss and claims described in paragraphs 4 and 6 above, were separate and distinct from the loss alleged in Delta National.

8. The first claim of any kind in respect to Delta National was the suit filed by plaintiffs in state court. Plaintiff's first suit was filed July 2, 1964. The second suit which went to judgment, was appealed

and reversed, and which is subject of this action, was filed May 21, 1965.

9. There were no notices of loss, proofs of loss, claims or suits ever made or filed on or against American Motorists other than those noted above.

10. Plaintiffs did not ask for jury trial in the state court.

11. At no time during the state court proceedings did plaintiffs raise any federal constitutional question.

- o -

The Louisiana Court of Appeal did not engage in reversing findings of fact. The critical part of that court's work is set forth in the following paragraphs of its opinion (App. pp. 26-27):

> As it is admitted that this policy was terminated as of September 16, 1959, to be covered under the clear provisions of the contract of insurance, or bond, the loss would have had to be discovered within two years from that date, or, at the latest, September 16, 1961. If it was not discovered by that date, the policy by its express terms does not cover the loss, as the policy provides that it "... shall apply only to such loss which shall be discovered prior to the expiration of two years from the effective date of cancellation or termination of this policy ...". Assuming, however, that a timely discovery was made on the last possible date, namely, September 16, 1961, the policy then provides that no suit shall be brought to recover under the policy "... unless commenced within two years from the date upon which the loss was discovered by the assured."

> It is clear, therefore, that considering that the policy was cancelled or terminated as of September 16, 1959, and that only losses are covered which shall be discovered prior to the expiration of two years from said cancellation date, and further that suit under the policy must be commenced within two years from the date upon which the loss was discovered, it is apparent that the suit must have been commenced within four years from the date of termination or on or prior to September 16, 1963. The first suit by the petitioners against the defendant was filed July 2, 1964, and the present suit was not filed until May 21, 1965. Under the clear provisions of the policy or bond, prescription had accrued, and the exception of prescription should have been sustained.

ARGUMENT

Nothing could be plainer than the simple fact that this case in no way involves the question of constitutionality of appellate review of facts.

Appellants' brief appears to be more or less a borrowed one concerned with the jury trial issue, as little if any of its content is applicable here.

There is much argument about demeanor of witnesses, the Seventh Amendment relative to jury trials, etc., all of which is so immaterial as to justify disregard.

Nowhere in their brief here, or in any previous court, have appellants ever challenged the correctness of the facts recited above as being undisputed. The facts are not and never have been in dispute. Of course, plaintiffs have tried mightily to avoid the legal effects of

those undisputed facts by trying to interpret the contract here involved in a wholly unrealistic way.

Once again, there is no dispute as to what the contract says. As set forth in their petition for writs in the Louisiana Supreme Court (App. pp. 28-43), appellants sought to give a different legal meaning to the words of the insuring contract (eg., App. pp. 38, et seq.)

It is reasonable to ask what is it that appellants seek? Do they seek a re-litigation of the same issues that have been litigated exhaustively already? No, the prayer of the complaint indicates that they seek a reinstatement of the judgment of the state district judge (App. pp. 5-6). But remember, in his reasons Judge Lindsey, the state district judge, specifically did not rule on appellee's plea of prescription, but left that issue for the appeals court. Evidently, appellants would deny to appellee its right to have its plea of prescription decided.

We are hard pressed to discover or classify any "right or privilege" of appellants which they claim was abridged. Apparently they contend simply that it is unconstitutional for an appeals court to reverse a district court's findings of fact under any circumstances. This is not the law in the state or in the federal judiciary.

In any event, that being the only point raised, it is specious because the Louisiana appeals court

ruled (1) on a point of law (2) which the district judge specifically refused to rule on.

CONCLUSION

Appellee submits that this appeal, as the complaint in the district court, is frivolous and wholly without merit.

The attempt to yoke this case with other cases involving jury trials and appellate review of jury fact finding is both factually and legally inappropriate.

This appeal deserves no more than a summary dismissal with costs being assessed against appellants.

Respectfully submitted,

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APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29604

WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN and MRS. EDITH GILL,
Plaintiffs-Appellants,

versus

AMERICAN MOTORISTS INSURANCE CO., HON. JOHN J. McKEITHEN, HON. JACK P. F. GREMILLION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 8, 1971)

Before BROWN, Chief Judge, and WISDOM and RONEY, Circuit Judges.

WISDOM, Circuit Judge: The plaintiffs appeal from a judgment of the district court granting the motion of American Motorists Insurance Company to dis-

miss for failure to state a claim upon which relief could be granted. We affirm.

The plaintiffs first filed suit against American Motorists Insurance Company in 1964 in a Louisiana state court seeking to recover under the provisions of a fidelity bond or policy that had been issued by the company. The trial court rendered judgment for the plaintiffs in the amount of $14,500 plus statutory penalties and attorneys' fees. The Louisiana First Circuit Court of Appeals, however, reversed the judgment of the trial court on the ground that the plaintiffs were barred by their failure to bring suit within the prescriptive period provided in the policy. *See Gore v. American Motorists Ins. Co.*, 225 So.2d 627 (La. Ct. App. 1969). The Supreme Court of Louisiana refused to grant the plaintiffs' petition for writ of review or certiorari. *See Gore v. American Motorists Ins. Co.*, 227 So. 2d 596 (La. 1969).

The plaintiffs then instituted this suit in the United States District Court for the Eastern District of Louisiana. In their complaint they alleged that the action of the Louisiana First Circuit Court of Appeal and the Supreme Court deprived them of rights guaranteed by the United States Constitution and prayed that the federal district court reinstate their state trial court judgment. Specifically, the plaintiffs argued that review by the Louisiana Court of Appeal of questions of fact as well as law, provided for in Article 7, § 29 of the Louisiana state constitution,[1] deprives them of their

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[1] 2 L.S.A. — Const. Art. 7, § 29 (Supp. 1970) provides in pertinent part:

Seventh Amendment right to trial by jury,[2] which is protected against state encroachment by the Fourteenth Amendment. Accordingly, they also prayed that the federal district court permanently enjoin all Louisiana appellate judges from re-examining any fact found by a trial court in a civil case. Implicit in the plaintiffs' argument, of course is their view that the decision of the Louisiana First Circuit Court of Appeal reversing their trial court judgment was based on such a re-determination of the facts.

The question of the constitutionality of Louisiana's system of appellate review of civil cases is an interesting one. At the present time there are pending before a three-judge court in the Eastern District of Louisiana some eight cases consolidated under the style of *Melancon v. McKeithen*, Civil Action Number 3390, each presenting precisely that question. Indeed, the plaintiffs invited the district court to consolidate their case with

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All appeals of which the courts of appeal have appellate jurisdiction as provided in this Section shall be on both the law and the facts, except where the appeal is limited to question of law only by any other Section of this Constitution.

Although the plaintiffs have not directly challenged its constitutionality, we should note that 2 L.S.A. — Const. Art. 7, § 10 (6) also provides for appellate review of facts:

In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts.

[2]The constitutional right that the plaintiffs allege has been denied in their case is contained in the second clause of the Seventh Amendment:

... and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S.C.A. Const. Amend. 7.

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that group. This the district court wisely declined to do, for to decide this case it is not necessary to reach the plaintiffs' constitutional argument.

It is apparent from a review of the record that the Louisiana First Circuit Court of Appeals and the Supreme Court in no way disturbed any of the trial court's fact findings. The decision of the First Circuit Court of Appeals was based solely upon its construction of certain terms in the insurance company's fidelity policy.[3] The construction of contracts — that is, the pro-

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[3] We feel that the Lower Court erred in overruling the exception of prescription of two years filed by the defendant in the Lower Court. The record discloses that the policy of insurance, or bond, issued by defendant provided as follows:

"The insurance afforded by Insuring Agreement I shall apply only to such loss which shall be discovered prior to the expiration of two years * * * from the effective date of the cancellation or termination of this policy. * * *

"* * * No suit to recover on account of loss under this policy shall be brought * * * unless commenced within two years from the date upon which the loss was discovered by the assured."

* * *

As it is admitted that this policy was terminated as of September 16, 1959, to be covered under the clear provisions of the contract of insurance, or bond, the loss would have had to be discovered within two years from that date, or, at the latest, September 16, 1961. If it was not discovered by that date, the policy by its express terms does not cover the loss, as the policy provides that it "* * * shall apply only to such loss which shall be discovered prior to the expiration of two years from the effective date of cancellation or termination of this policy * * *". Assuming however, that a timely discovery was made on the last possible date, namely, September 16, 1961, the policy then provides that no suit shall be brought to recover under

cess of determining the legal effect of language — is of course a function of the court not the trier of fact. *Williams v. Humble Oil & Refining Company*, 5 Cir. 1970, 432 F.2d 165, 179; 3 A. Corbin, Contracts § 554. In their petition for writ of review or certiorari the plaintiffs seemed to recognize as much, for they argued merely that the First Circuit Court of Appeals's construction of the policy conflicted with the established jurisprudence of the Supreme Court. Since the plaintiffs are thus not persons aggrieved by the system, they are in no position to challenge here the Louisiana Court of Appeals's review of facts.

Moreover, since we can perceive of no constitutional objection that could be lodged against appellate review of the lower courts' conclusions of law, we must agree

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the policy "* * * unless commenced within two years from the date upon which the loss was discovered by the assured."

It is clear, therefore, that considering that the policy was cancelled or terminated as of September 16, 1959, and that only losses are covered which shall be discovered prior to the expiration of two years from said cancellation date, and further that suit under the policy must be commenced within two years from the date upon which the loss was discovered, it is apparent that the suit must have been commenced within four years from the date of termination or on or prior to September 16, 1963. The first suit by the petitioners against the defendant was filed July 2, 1964, and the present suit was not filed until May 21, 1965. Under the clear provisions of the policy or bond, prescription had accrued, and the exception of prescription should have been sustained.

Gore v. American Motorists Ins. Co., 225 So. 2d 627, 629 (La. Ct. App. 1969).

with the district court that the plaintiffs' complaint failed to state a claim upon which relief could be granted. For this reason we affirm the judgment of the district court granting American Motorists's motion to dismiss.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1970

No. 29604

D.C. Docket No. C.A. 69-248

WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN and MRS. EDITH GILL,
Plaintiffs-Appellants,

versus

AMERICAN MOTORISTS INSURANCE CO., HON. JOHN J. McKEITHEN, HON. JACK P. F. GREMILLION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before: BROWN, Chief Judge, WISDOM and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 8, 1971

Issued as Mandate:

APPENDIX E

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NUMBER 29604

WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN AND MRS. EDITH GILL, PLAINTIFFS AND APPELLANTS

VERSUS

AMERICAN MOTORISTS INSURANCE COMPANY, HON. JOHN J. McKEITHEN, HON. JACK P. F. GREMILLION, HON. JOHN B. FOURNET, HON. E. HOWARD McCALEB, JR., HON. WALTER B. HAMLIN, HON. JOE B. HAMITER, HON. MACK E. BARHAM, HON. JOE W. SANDERS AND HON. FRANK W. SUMMERS, DEFENDANTS AND APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION.

PETITION FOR REHEARING ON BEHALF OF WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN AND MRS. EDITH GILL, PLAINTIFFS AND APPELLANTS.

MAY IT PLEASE THIS HONORABLE COURT:

PETITION FOR REHEARING

The petition for rehearing of appellants and original plaintiffs Willis L. Gore, Mrs. Jennie Downs, Mrs. Janet McCain and Mrs. Edith Gill, aggrieved by the decision rendered April 8, 1971 by this United States Court of Appeals for the Fifth Circuit, the same

being clearly contrary to the law and the facts as found by the original trial court fact-finder, with respect represents that:

POINTS OF LAW AND FACT
OVERLOOKED OR MISAPPREHENDED

This court was clearly in error in deciding that the Louisiana First Circuit Court of Appeal in no way disturbed any of the original trial court's fact findings and in concluding that the First Circuit Court of Appeal based its decision on construction of an insurance policy rather than on its interpretation.

ARGUMENT IN SUPPORT OF THE PETITION FOR REHEARING

This court on April 8, 1971 ruled that it would not concern itself here with the real and pressing problem of Louisiana violating its citizens' constitutional guarantees against appellate review of facts because in this particular case Louisiana's First Circuit Court of Appeal did not reverse a finding of fact.

This court erroneously found that the state appellate court was reversing the lower court's finding

pursuant to construction of an insurance contract rather than an interpretation of the policy.

This court based its opinion on Corbin on Contracts § 554 and on Williams v. Humble Oil Refining Company, 5 Cir. 1970, 432 F. 2d 165, which was itself based wholly on Professor Corbin's treatise on contracts. This court correctly stated that construction is a function on the part of the court. However, plaintiffs-appellants do most respectfully submit that this court clearly was in error in its understanding of the term construction, and therefore came to an erroneous conclusion as to whether the Louisiana First Circuit Court of Appeal was engaging in reconstruction, redetermination of law, or in reinterpretation, redetermination of fact. At page 4 in the opinion construction is considered as follows:

> "The construction of contracts--that is, the process of determining the legal effect of language--is of course a function of the court not the trier of fact."

This court was here clearly in error in part. Its own cited authority without doubt shows that construction

has nothing whatsoever to do with the language of a contract or its meaning. The cited section of Professor Corbin's work clearly and unequivocally distinguishes between construction and interpretation.

Corbin on Contracts § 554 at p. 522:

> "As the terms are used in this treatise, interpretation is always a matter of fact not a matter of law, and construction is always a matter of law not a matter of fact. Interpretation is always the determination of the meaning of symbols of expression-written, spoken, or otherwise acted, the thoughts that were actually intended to be conveyed by the party using the symbols or the thoughts that were actually conveyed to some other party or parties. Construction is the determination of the legal operation of the transaction after meanings have been found in fact and interpretation is complete. This usage, although not identical with that of many courts and writers, is adopted for the sake of greater clarity of analysis and expression. It is almost invariably stated that interpretation is a matter of law for the court. This is not to be disapproved even though it is merely one instance of the many in which the judges have, on grounds of policy, withdrawn questions of fact from the jury. It is a rule that is made necessary if the processes of interpretation and construction, as above defined, are not differentiated but are carried on together. The determination of legal operation--the application of the law to the facts-is always for

> the judge and not for the jury. On the other hand, if the symbols of expression actually used or the circumstances under which they were used are doubtful or disputed, no one doubts that the issues involved therein are issues of fact."

Again, this court's understanding of the term construction, and its application are clearly erroneous. Construction has nothing whatsoever to do with the language of a contract. Construction deals exclusively with the legal effect or operation of a contract once the language has been interpreted by the trier of fact.

This court at page 5 of its opinion says that plaintiffs themselves recognized that the intermediate Louisiana appellate court engaged in contract construction rather than interpretation. It is submitted that plaintiffs' application for writs to the Louisiana Supreme Court in part dealt with reading of contract clauses out of context. While plaintiffs may have indeed cited certain authorities concerning construction, the application was basically concerned with contextual reading of contracts and was based upon cited Article 1955 of the Louisiana Revised Civil Code

which states:

> "All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act." Emphasis supplied.

Plaintiffs suggest that an application for writs in a totally unrelated area is hardly tantamount to any kind of admission.

Indeed, in denying plaintiffs' application, Louisiana's highest appellate court recognized the redetermination of facts indulged in by the intermediate reviewing court and therefore recognized the reinterpretation of the policy rather than its reconstruction when it said:

> "On the facts found by the Court of Appeal, there is no error of law in its judgment." Record, page 45.

The distinction between construction and interpretation is indeed a very fine one. In an effort to clarify this distinction, and with fear that the issue has been heretofore somehow slighted by plaintiffs' almost exclusive concern with constitutional issues, plaintiffs

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shall here briefly retrace the history of this case. The purpose is to indicate that the intermediate Louisiana appellate court delved in reinterpretation, refinding fact, rather than reconstruction, redetermining law.

Plaintiffs' suit was filed on July 2, 1964 in state district court. Defendant American Motorists Insurance Company filed a peremptory exception of prescription. It was here that the trial court went to the insurance contract or policy to determine if the exception of prescription had merit. In this unreported hearing and its resultant holding plaintiffs argued and the trial court found that plaintiffs' suit was timely filed--based on a factual situation. In other words, the construction or legal operation of the policy clause was never at issue. What was at issue, what was argued and what the trial court held was that the receiver appointed for Delta Fire & Casualty Company had made claims and instituted

a previous suit within the two year period of limitation. As such, the decision of the trial court on the exception of prescription was based solely on its interpretation of the terms of the policy as intending to allow suit or claim by the receiver to preserve the cause of action for plaintiffs and all others who might come into court as assureds under the policy. To say or even assume that the state trial court construed the policy to see if plaintiffs suit was filed timely is wrong. The facts conceivably might dictate that the suit by plaintiffs was not by itself timely filed. All that was ever argued or decided at the trial level was whether the contract terms were to be interpreted to allow a prior suit to preserve plaintiffs' cause of action as co-assureds with the Delta Fire receiver.

The trial court on hearing the exception of prescription interpreted the policy. The court looked at the list of assureds named in the policy: Delta Fire & Casualty Company, Delta National Mutual Insurance Company, Delta General Agency, Inc., Thomas Insurance Agency, Inc.

and Delta National Securities Corporation. The court considered the court-appointed receiver of Delta Fire and Casualty Company to be acting for that assured in the filing of the previous suit against American Motorists Insurance Company. The court looked at the provision of the policy that said:

> "D. If more than one Assured is covered by this Policy, the first named Assured shall act for itself and for each and all of the Assured for all the purposes of this Policy. * * *"

The court looked at the previous sheriff's sale where plaintiffs purchased all the claims that Delta National Mutual Insurance Company had against American Motorists Insurance Company.

The trial court found as a fact that the Delta Fire receiver filed its first suit inbehalf of all assureds against American Motorists Insurance Company on July 1, 1960. That was suit Number 76,418.

The trial court also found as a fact that the 2d suit, plaintiffs' first suit, subsequently dismissed as to

American Motorists Insurance Company, was filed on July 2, 1964. The third plaintiffs' suit resulted in the judgment later reversed by the intermediate appellate court. That was the suit filed May 21, 1965.

On the other hand, the First Circuit Court of Appeal found as a fact that no such first suit was ever filed! That court said (Record, P. 26):

> "The first claim of any kind in respect to Delta National Mutual was the first suit by petitioners filed July 2, 1964, and the second suit was filed May 21, 1965. The record clearly shows that no notices of loss, proofs of loss, claims or suits were ever made on the defendant except those listed above."

The Louisiana First Circuit Court of Appeal reversed the decision of the trial court solely on the proposition that the exception of prescription should have been maintained. Gore v. American Motorists Ins. Co., 225 So. 2d 627. That court could have arrived at that conclusion only by a redetermination of whether the prior suit by the Delta Fire Receiver protected plaintiffs' right to sue after the receiver's suit was

dismissed. That court could have only arrived at that conclusion by a reinterpretation of the language of the policy. Interpretation is always a matter of fact not of law. Corbin on Contracts § 554. The Louisiana First Circuit Court of Appeal clearly reviewed and redetermined the facts as found by the trial court.

If the First Circuit Court of Appeal was using a process of construction why then did it quote at great lengths portions of the policy's language? According to Corbin the process of construction becomes operative only after the language is clear and its meaning found by the trier of fact. This preoccupation with language on the part of the state appellate court indicates again that it interpreted the policy terms rather than construed its effects.

The fact that construction-interpretation questions are confused should not operate to deprive plaintiffs of their right to have the distinction made

and understood. Nor to deprive them of their constitutional rights granted them by the Seventh and Fourteenth Amendments and the Supremacy Clause of the Constitution of these United States of America.

CONCLUSION AND PRAYER

It is respectfully submitted that this court in its opinion of April 8, 1971 misapprehended construction of an insurance contract, falling into the same error as did Louisiana's appellate courts. Under this court's own cited authority and upon consideration of the history of the trial court's decision, it is clear that the Louisiana First Circuit Court of Appeal indulged in reinterpretation or redetermination of facts, an indulgence unequivocally prohibited by the Constitution of the United States as amended. Accordingly, plaintiffs with respect pray that a rehearing be granted.

By Attorney for Plaintiffs-Appellants,

RALPH BREWER
300 Louisiana Avenue
Suite 107
Baton Rouge, Louisiana 70802
Telephone 348-0293

CERTIFICATE

I hereby certify that copies of this petition for rehearing has been mailed to counsel for defendants.

Baton Rouge, Louisiana, this _____ day of May, 1971.

RALPH BREWER
107 The Attorneys' Building
300 Louisiana Avenue
Baton Rouge, Louisiana 70802
Telephone 348-0293

APPENDIX F

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 29604

WILLIS L. GORE, MRS. JENNIE DOWNS, MRS. JANET McCAIN and MRS. EDITH GILL,
Plaintiffs-Appellants,

versus

AMERICAN MOTORISTS INSURANCE CO., HON. JOHN J. McKEITHEN, HON. JACK P. F. GREMILLION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana.

(Filed May 27, 1971)

ON PETITION FOR REHEARING

Before: BROWN, Chief Judge, WISDOM, and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

MINUTE ENTRY:
February 6, 1970
WEST, J.

WILLIS L. GORE, ET AL

versus

AMERICAN MOTORISTS INSURANCE COMPANY, ET AL

CIVIL ACTION
NO. 69-248

This cause came on for hearing this day on a motion by defendent, American Motorists Insurance Company, to recall stay order, to dismiss, and/or for summary judgment.

PRESENT: Ralph Brewer, Esq.
Attorney for plaintiffs

Robert E. Leake, Jr., Esq.
Attorney for defendant, American Motorists Insurance Co.

The Court hears the arguments of counsel.

IT IS ORDERED that the stay order issued herein be, and it is hereby, RECALLED, and

IT IS FURTHER ORDERED that the motion by defendant, American Motorists Insurance Company, to dismiss be, and it is hereby, GRANTED.

****

Jack P. F. Gremillion

APPENDIX H

SUPREME COURT OF LOUISIANA
New Orleans, 70112

No. 50,138 November 12, 1969

Willis L. Gore, et al

v.

American Motorists
Insurance Company

In re: Willis L. Gore et al applying for certiorari, or writ of review, to the Court of Appeal, First Circuit, Parish of East Baton Rouge.

Writ refused. On the facts found by the Court of Appeal, there is no error of law in its judgment.

/s/ JWS
/s/ JBF
/s/ JBH
/s/ EHMcC
/s/ WBH
/s/ FWS
/s/ MEB

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
November 12, 1969
/s/ S. Wallace Miller
Deputy Clerk

APPENDIX I

LOUISIANA FIRST CIRCUIT
COURT OF APPEAL

WILLIS L. GORE, ET AL	* STATE OF LOUISIANA
VS.	* COURT OF APPEAL
AMERICAN MOTORISTS	* FIRST CIRCUIT
INSURANCE COMPANY	* NO. 7716

DECISION

Appeal from the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, Louisiana, Honorable Coleman Lindsey, Presiding Judge.

Before LOTTINGER, ELLIS and BAILES, Judges.
Lottinger, Judge.

This is a suit by Willis L. Gore, and others, against the American Motorists Insurance Company seeking to recover under the provisions of a fidelity bond issued by said insurance company in favor of Delta National Mutual Insurance Company. The Lower Court rendered a judgment in favor of petitioners and against defendants. The defendants have appealed and the petitioners have answered the appeal seeking an increase in quantum.

On July 1, 1954, the defendant herein issued a dishonesty, disappearance and destruction policy or bond in favor of Delta National Mutual Insurance Company, Delta Fire and Casualty Company, Delta General Agency, Inc., Thomas Insurance Agency, Inc., and Delta National Securities Corporation, for any fraudulent or dishonest act or acts committed by any of its officers, managers or employees with coverage up to $80,000.00, for each fraudulent and dishonest act. Each of the assured was and is a separate corporate entity, and each had its own officers and directors, however, some of them may have served in one

or more capacities and for one or more of the corporations. These corporations operated out of an office located in the City of Baton Rouge, and David W. Thomas was the head of each corporation.

Delta National Mutual Insurance Company had a very old mutual fire insurance company charter. Thomas purchased this company and its charter in 1955, and operated the company for a period of two years as a mutual fire insurance company. He discontinued its insurance operations on December 31, 1957, with the intentions of converting to a life insurance company, however, after that time the company became dormant and inactive.

While Delta National Mutual was still active in the Insurance field, it endeavored to raise money by borrowing substantial sums from private lenders. In representation of these loans, Guaranty Fund Certificates were issued by Delta National Mutual to its private lenders, and, as of December 31, 1956, these certificates totaled $250,000.00, however, as of December 31, 1957, when the company had become dormant, the total of these certificates had risen to $300,400.00. These loans by the private individuals to the insurance company were made pursuant to the provisions of R.S. 22:124.

Under this arrangement, loans were made by Willis L. Gore to the company totaling $12,500.00, and by Fletcher G. Downs, now deceased, in the total sum of $2,000.00.

By the end of the year 1957, Delta National Mutual had sold and transferred to Delta Fire and Casualty Company, its real estate mortgage notes and fire insurance policy, and there remained as its only asset a bank account in the amount of some $121,400.00 in cash. This was in spite of the outstanding liabilities on the Guaranty Fund Certificates. Shortly subsequent thereto, Thomas personally withdrew the $121,400.00 in cash from the banking account, completely depleting same.

On August 11, 1959, Delta Fire, to whom Delta National had sold its fire insurance business and real estate mortgages, was placed into receivership by the Louisiana Insurance Commissioner. A receiver was appointed and he gave notice to American Motorists during August, 1959, of his discovery of the acts of withdrawal of funds by Thomas from Delta Fire. A formal proof of claim based upon the actions of Thomas was forwarded some month or so following.

On July 1, 1960, the receiver for Delta Fire filed a suit against American Motorists seeking the recovery of certain withdrawals made by Thomas from the Delta Fire account in the amount of some $137,900.00. This suit was subsequently settled and dismissed on September 8, 1964.

On July 2, 1964, Willis L. Gore and the widow and heirs of Fletcher G. Downs, who are the petitioners in this present suit, filed suit against American Motorists and Delta National Mutual for the sums which they alleged were due them under the guaranty certificates. Defendant filed an exception of no right or cause of action based on the allegation in the petition that petitioners were upaid creditors of Delta National Mutual. As such, they had no cause of action against defendant for the simple reason that the plaintiffs were suing in the position of creditors of Delta Mutual Fund, a fact upon which defendant agreed, and that, therefore, there was no cause of action shown on the bond issued by American Motorists. Thus the demands made by petitioners as against American Motorists were dismissed.

Thereafter, on March 9, 1965, a preliminary default was entered by plaintiffs against Delta National Mutual which default was confirmed and a written judgment rendered as prayed for by petitioners.

Subsequently, on May 5, 1965, plaintiffs purchased at Sheriff's Sale all of the causes of actions, demands, claims,

and rights of actions of any kind that Delta Nation Mutual had against American Motorists. Included in th sale, of course, was any right of action under the bon issued by defendant.

On May 21, 1965, the present suit was filed by pet tioners against defendant wherein petitioners claim th withdrawal by David W. Thomas of the sum o $121,400.00 from Delta National Mutual account wa covered by the 3D bond issued by defendant. In the cu rent suit, petitioners appear as owners of all the cause o actions, rights of actions, claims and demands of any kin that Delta National has against defendant, which right were purchased by them at the Sheriff's Sale. Certain ex ceptions were filed by the defendant, among which was a exception of prescription, all of which were overruled by the Lower Court, and the Lower Court rendered judgmen in favor of petitioner Gore in the sum of $12,500.00, and in favor of the widow and heirs of Fletcher G. Downs in the sum of $2,000.00. Defendant has appealed and peti tioners have answered the appeal.

We feel that the Lower Court erred in overruling the exception of prescription of two years filed by the defend- ant in the Lower Court. The record discloses that the policy of insurance, or bond, issued by defendant provided as follows:

> "The insurance afforded by Insuring Agreement I shall apply only to such loss which shall be dis- covered prior to the expiration of two years . . . from the effective date of the cancella- tion or termination of this policy . . ."* * * * * *
>
> "* * * "No suit to recover on account of loss under this policy shall be brought . . . unless com- menced within two years from the date upon which the loss was discovered by the assured."

It was stipulated by and between counsel that the contract of insurance was cancelled on September 16, 1959. The record discloses that discovery of the loss, at least with regard to Delta Fire and Casualty Company, was made during August of 1959, and that a proof of loss was filed by its receiver on November 24, 1959. The Delta Fire and Casualty suit was filed on July 1, 1960, and terminated by compromise and dismissed in September, 1964.

The first claim of any kind in respect to Delta National Mutual was the first suit by petitioners filed July 2, 1964, and the second suit was filed May 21, 1965. The record clearly shows that no notices of loss, proofs of loss, claims or suits were ever made on the defendant except those listed above.

As it is admitted that this policy was terminated as of September 16, 1959, to be covered under the clear provisions of the contract of insurance, or bond, the loss would have had to be discovered within two years from that date, or, at the latest, September 16, 1961. If it was not discovered by that date, the policy by its express terms does not cover the loss, as the policy provides that it ". . . shall apply only to such loss which shall be discovered prior to the expiration of two years from the effective date of cancellation or termination of this policy . . .". Assuming however, that a timely discovery was made on the last possible date, namely, September 16, 1961, the policy then provides that no suit shall be brought to recover under the policy ". . . unless commenced within two years from the date upon which the loss was discovered by the assured."

It is clear, therefore, that considering that the policy was cancelled or terminated as of September 16, 1959, and that only losses are covered which shall be discovered prior to the expiration of two years from said cancellation date, and further that suit under the policy must be commenced within two years from the date upon which the loss was

discovered, it is apparent that the suit must have been commenced within four years from the date of termination or on or prior to September 16, 1963. The first suit by the petitioners against the defendant was filed July 2, 1964, and the present suit was not filed until May 21, 1965. Under the clear provisions of the policy or bond, prescription had accrued, and the exception of prescription should have been sustained.

For the reasons hereinabove assigned, the judgment of the Lower Court will be reversed, and there will be judgment herein in favor of defendant and against the petitioners, dismissing the petitioners' suit at petitioners' cost.

JUDGMENT REVERSED

APPENDIX J

TRIAL COURT OPINION

WILLIS L. GORE, ET AL.	:	NUMBER 107,087–
	:	DOCKET 4
VS.	:	19TH JUDICIAL DIS-
	:	TRICT COURT
AMERICAN MOTORISTS	:	PARISH OF EAST
INSURANCE COMPANY	:	BATON ROUGE
	:	STATE OF LOUISIANA

Let me say at the outset that the final disposition of this claim is very much overdue, and for that reason the court is disposed to make final disposition of it without any additional delay.

As was indicated to counsel earlier in this trial, this court is not going to consider any defense of prescription and the other defense allied thereto. These are matters that have been passed on by other judges of this court, and this particular trial judge proposes to let these questions go to the appellate court on the basis of prior rulings.

So far as a decision in this matter is concerned, it appears to the court that there is only one question of law that must be considered; all the other questions are questions of fact. It is abundantly shown that the operations of the so-called Delta companies was exceedingly complicated; however, in analyzing the claim asserted here today, the court finds that it is not shot through with complications. The facts are clear and undisputed. These plaintiffs seek to recover on what has been called guaranty fund certificates issued by Delta National Mutual Insurance Company. The amounts involved are not disputed, in fact, they are shown by documentary evidence. The plaintiff Gore sues on a total of $12,500 of these certificates, and the Downs estate on a $2,000 total. It is undisputed that no redemption of

these certificates has ever been made. Somewhere in the early proceedings the suit of these plaintiffs was dismissed on an exception of no cause of action, which the court is not going into but simply notes that following that dismissal plaintiffs confirmed a default against Delta National Mutual Insurance Company for the amounts of their claims and proceeded to seize all of the claims of Delta National Mutual Insurance Company. There is no contention with reference to those proceedings: they became the owners of all such claims, and as such they filed the present suit. The only point on which the court feels that a question of law is involved is that relative to whether the acts of the former president of Delta National Mutual Insurance Company, David W. Thomas, committed acts of dishonesty which would be covered by the bond or the insurance policy of the defendant in this case. It has been urged here that he withdrew these large sums from Delta National in payment of guaranty fund certificates held and owned by him. That is not shown by the record. The court questioned Mr. Evans, the accountant, as to the names of the holders of such certificates, and Mr. Evans said that he was unable to furnish that information. Whether Thomas withdrew these funds totaling $121,400 in redemption of guaranty fund certificates held and owned by him or whether he withdrew these funds for the purpose of bolstering up other corporations in the Delta group, or whatever his purpose might have been, it seems to this court to make no difference. If I could be pardoned for using what might be termed a very homely expression, regardless of what his purpose was, the ultimate effect of it was that he gutted Delta National Mutual Insurance Company. He stripped it of all of its assets, with little minor exceptions, and made it absolutely impossible for that company to redeem the certificates here sued on. Turn that around any way you please, choose any horn of that dilemma that you want to, the court can give it no other characterization than dishonesty. I don't think it requires any citation of authority for the court to so

hold. And that is what this bond or this insurance policy was designed to protect Delta National Mutual from. It might be argued that they were not hurt. They were hurt, because they were rendered totally unable to meet their obligations because of these dishonest acts.

We come now to a phase of this case that has not been argued but one that I have given considerable consideration to. Plaintiff says that in the litigation it stands in the shoes of Delta National Mutual. Technically that is true, but actually it stands in those shoes only to the extent that it is the transferee of all claims held and owned by that company. Now what are those claims? The only one that is before the court is the claim that seeks recovery of enough funds to pay the claim of these plaintiffs. What I am saying is, if judgment should be rendered in favor of these plaintiffs for $121,400, what would they do with the surplus over and above the total amount of their claims on these certificates? You might say they would be entitled to keep it. I don't think so. I don't think that any court would condone unjust enrichment. Nor do I think that legally they are entitled to recover anything over and above what is required to satisfy the only outstanding claims against this defunct corporation. I propose to give to these plaintiffs what they asked for from the outset. They sought judgment for the face value of their certificates with interest; they also sought judgment for statutory penalities and for reasonable attorney's fees. When the court inquired this morning whether you gentlemen wanted to explore the possiblity of settlement I thought there was some likelihood that one side or the other might suggest that as a basis for talking settlement. I do not know whether you did or not; it is none of the court's business and it is certainly beside the point at this particular time.

Dealing with statutory penalities and attorneys' fees involves special statutes that have been cited in plaintiffs'

pretrial memoranda. He cited there the case of Williams v. Travelers, 157 So.2d 356, as authority for the proposition that where a defendant denied liability in a case of this kind that it was a waiver of proof of loss. I cannot agree that it is authority for that proposition. I think it is authority only for the question of penalities and attorneys' fees. But be that as it may, I have already told you that I am not passing again on this question of proof of loss. I do think that statutory penalities and attorneys' fees should follow the judgment in this case. I might add that I had examined plaintiffs' pretrial memoranda, and I do not question the authorities that he has cited there with that one exception, and as I have already said that is immaterial now. But many of those authorities he cited are not applicable unless this court reconsidered the plea of prescription.

So for the reasons that I have stated, there is judgment for these plaintiffs, in the case of Willis L. Gore in the principal amount of $12,500, and in the case of the other plaintiffs, Mrs. Downs and her daughters, in the total amount of $2,000, with interest as provided in the certificates. Again I am open for correction; I think from what Col. Gore testified, that this interest in his case at least was paid up to the end of June 1958. If so, his interest will begin from July 1, 1958. I would assume without having any real right to do so, that the same thing would be true about these other plaintiffs. To that will be added the statutory penalties of 12%, leaving only the question of fixing reasonable attorneys' fees. I have not, as I said, heard any argument on that. I think two things must be considered, in the first place, the amount recovered; and the other is the amount of work involved in the case. It is my opinion that an attorneys' fee of $5,000 would be proper in this case, and that is the judgment of the court.

The expert witness fee of David M. Evans is fixed at $50 and taxed as costs.

Judgment will be signed accordingly.

September 18, 1968.

Filed
Nov. 26, 1968

/s/ Gladys C. Hearne

Dy. Clerk of Court

APPENDIX K

TRIAL COURT JUDGMENT

WILLIS L. GORE, ET AL.	:	NUMBER 107,087,
	:	DOCKET NO. 4
VS.	:	19TH JUDICIAL DIS-
	:	TRICT COURT
AMERICAN MOTORISTS	:	PARISH OF EAST
INSURANCE COMPANY	:	BATON ROUGE
	:	STATE OF LOUISIANA

This matter came on for trial this September 18, 1968 pursuant to regular assignment. Present in court: Willis L. Gore, Mrs. Jennie L. Downs and Mrs. Edith Gill, three of the four plaintiffs, and their two attorneys, Ralph Brewer and Kenneth C. Scullin, and Robert E. Leake, Jr. and James W. Tranchin, both of the law firm of Hammett, Leake and Hammett, attorneys for defendant.

After hearing evidence adduced on trial of the matter, and after hearing oral argument by counsel, the court concluding that the evidence preponderates in favor of plaintiffs, the law and the evidence being in favor thereof, for oral reasons assigned:

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby rendered against defendant American Motorists Insurance Company in favor of plaintiff Willis L. Gore in the full sum of Twelve Thousand, Five Hundred and no/100 ($12,500.00) Dollars, together with interest at the rate of six (6%) per cent per annum from December 31, 1958 until paid, together with an additional twelve (12) per cent of the principal and accrued interest as damages; and also against defendant American Motorists Insurance Company in favor of plaintiffs Mrs. Jennie L. Downs, Mrs. Edith Gill and Mrs. Janet McCain in the additional sum of

Two Thousand and no/100 ($2,000.00) Dollars, together with interest at the rate of six (6%) per cent per annum thereon from December 31, 1958 until paid, together with an additional sum of twelve (12%) per cent on the principal and accrued interest as damages; and, further, also against defendant American Motorists Insurance Company and in favor of plaintiffs Willis L. Gore, Mrs. Jennie L. Downs, Mrs. Edith Gill and Mrs. Janet McCain the full and additional sum of Five Thousand and no/100 ($5,000.00) Dollars as statutory attorney's fees; as well as for all costs of these proceedings, the expert witness fee of David Evans, Certified Public Accountant, being hereby fixed at the sum of $50.00, and taxed as costs hereof.

JUDGMENT RENDERED in Open Court at Baton Rouge, Louisiana, on this September 18, 1968.

JUDGMENT READ AND SIGNED in Open Court at Baton Rouge, Louisiana, on this , day of September, 1968.

/s/ Coleman Lindsey

Judge 19th Judicial District Court